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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

—v.—

JEFFREY MAY, individually, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF APPELLEES

JOHN A. POWELL
DAVID B. GOLDSTEIN
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ERIC NEISSER
ACLU OF NEW JERSEY
38 Walnut Street
Newark, New Jersey 07102
(201) 642-2084

NORMAN L. CANTOR*
RICHARD M. ALTMAN**
ANNE P. MCHUGH
PELLETTIERI, RABSTEIN & ALTMAN
13 West Front Street
Trenton, New Jersey 08604
(609) 989-7000
Attorneys for Appellees

*On the Brief
**Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1). Whether standing to appeal exists for an individual legislator who originally entered the suit exclusively as a representative of the New Jersey Assembly and whose successor as official representative of that body has determined not to pursue an appeal?

2). Whether the trial court correctly determined that New Jersey's minute of silence law constitutes an establishment of religion because the Legislature's actual purpose was to return prayer to the schools and its proffered secular purpose was a mere pretext?

3). Whether the direct and immediate effect of New Jersey's minute of silence law as enacted and implemented is to advance religion?

4). Whether rule 52(a)'s "clearly erroneous" standard of review applies to the District Court's findings that A-1064 had no secular purpose and was enacted to reintroduce school prayer?

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STATEMENT OF THE CASE

The history of this challenge to New Jersey's minute of silence law (hereinafter Bill A-1064) has been set out at length in Appellants' Brief and in the *amicus* brief of the Solicitor General. Appellees here will simply highlight the chronology of events involved in this litigation.

March 8, 1982: Bill A-1064, requiring a one minute period of silence in every public elementary and secondary school in New Jersey, is introduced. (J.S.A. 111a).[1] The bill succeeds Bill A-2197 (1981), requiring a period of silence "not to exceed one minute," which had been vetoed by Governor Brendan Byrne in May 1981 as "either unconstitutional or unnecessary." (J.A. 399).

May 17, June 21, and September 23 (1982): Perfunctory hearings are held before the Assembly Education Committee (May 17), and before the Senate Education Committee (June 21, September 23). (J.A. 268-70, 274-76, 406-07, 408-09). In all these hearings, A-1064's main sponsor, Assemblyman Zangari, is the sole witness favoring the bill. There is no testimony from any educator or psychologist indicating any non-prayer utility of a minute of silence. Professional educators' organizations uniformly oppose the bill.

October 1982: Bill A-1064 passes the Assembly and Senate.

December 6, 1982: Governor Kean vetoes A-1064 on the basis that legislators' statements reveal "a constitutionally impermissible motive" and the bill is therefore "unlikely [to] pass constitutional muster." (J.A. 382-83). The Governor, a teacher by training, also notes that teachers already have

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1 Appellees' citation system is as follows: "J.S.A." refers to the appendix attached to Appellants' jurisdictional statement. "Mot. to Dism. App." refers to the appendix attached to Appellees' motion to dismiss the appeal. "J.A." refers to the joint appendix filed in this Court. "J.A. 3d Cir." refers to the joint appendix filed in the Third Circuit. "R." refers to the transcript of the trial conducted by the district court.

discretion to use silence in the classroom when educationally needed.

December 13 & 16, 1982: The Assembly and Senate override the Governor's veto and A-1064 by its terms becomes effective immediately. The override debates are short and preoccupied with discussion of prayer in the classroom. (J.A. 36-37, 369-72, Plaintiffs' Exhibits 1-5, 10, 13, 15, 17).

December 17, 1982: The Deputy Commissioner of Education notifies school districts that A-1064 has been adopted and that "the statute should be permitted to speak for itself." (J.A. 3d Cir. 19a). No implementing guidelines are promulgated.

December 22, 1982: In testimony before the Senate Judiciary Committee the State Attorney General explains his decision not to defend Bill A-1064. He relies on a seldom-used discretion not to defend a state measure which he conscientiously believes is unconstitutional. (Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 2-4).

January 10, 1983: Judge Debevoise issues a temporary restraining order against implementation of A-1064, relying on legislators' reported public statements indicating that the bill's object is to return prayer to the schools. (J.A. 51-53).

January 18, 1983: The state Assembly and Senate, through their presiding officers acting in a representative capacity, are allowed to intervene to defend A-1064. (J.A. 54).

October 10, 1983: After a five-day trial, Judge Debevoise finds that the Legislature's sole proffered purpose for A-1064—creation of a transition period—is a pretext. The actual purpose is found to be "religious"—meaning an effort to return prayer to the schools in an unconstitutional manner. (J.S.A. 86a-94a).[2]

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2 Appellants erroneously contend that the district court applied a novel standard requiring "an overwhelmingly obvious and important secular

December 24, 1985: A divided panel of the Third Circuit affirms the judgment of the district court. (J.S.A. 3a).

April 1986: The successor representatives of the state Assembly and Senate withdraw the appeal to this Court. (Mot. to Dism. App. 1a-5a).

SUMMARY OF ARGUMENT

I. In January 1983, after New Jersey's Attorney General refused to defend A-1064, the New Jersey Legislature intervened in the instant litigation through the then presiding officers of the Assembly and Senate, Alan Karcher and Carmen Orechio. The intervention hearing shows clearly that Karcher and Orechio intervened exclusively in an official capacity as representatives of their legislative bodies.

In April 1986, the successor representatives of the New Jersey Senate and Assembly withdrew the Legislature's appeal to this Court. Their action ends the case or controversy before this Court concerning the constitutionality of A-1064.

The only remaining Appellant, Alan Karcher, has no standing to bring this appeal. Karcher (who entered the suit solely in a representative capacity) has no standing as an individual legislator. In the first place, he did not enter the suit in that capacity and cannot change his capacity at this stage. *See Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1332 (1986). Second, where a collective body like a legislature controls a decision whether to appeal, only an official representative of that body (or the body itself) can make such a decision. *Id.* The official representatives of the New Jersey Senate and Assembly, Messrs. Russo and Hardwick, have withdrawn the instant appeal. Their decision governs. Finally,

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purpose" in order for a statute to satisfy the purpose prong of *Lemon v. Kurtzman*. (Appellants' Br. at 8, 28). The quoted language is taken out of context from a segment of the district court opinion distinguishing *United States v. O'Brien*, 391 U.S. 367 (1968), from the instant case. The trial court did not use that quoted language as the standard for secular purpose.

Alan Karcher as an individual legislator lacks Article III standing to bring this appeal. A single legislator's interest in the constitutional validity of an enactment does not constitute a particularized stake sufficient to confer standing.

The notion that Karcher can appeal as a representative of the 200th legislature, which expired three and one-half years ago, is divorced from reality. The decision whether to litigate further the fate of a state enactment declared invalid is a matter for the current legislative body. *See Diamond v. Charles*, 106 S Ct. 1967, 1703-04 (1986). The current legislature represents the constituency affected by such a decision, and the current legislature determines whether to incur the expenses involved.

II. Although A-1064 did not use the word prayer, it was surrounded by enough indicia of prayer to warrant the district court's inquiry into legislative purpose. Bill A-1064 was the eighteenth legislative measure since 1968 that sought to inject a morning silence exercise into New Jersey schools—measures introduced "in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling." (J.S.A. 86a).[3] In addition, both the governor (in casting a veto) and the attorney general (in refusing to defend the statute) had made independent determinations that A-1064 was motivated by an illicit religious purpose.

The district court used the very tools—examination of the background and circumstances of the legislative process—which this Court has endorsed whenever constitutional doctrine makes illicit legislative purpose a relevant inquiry. The examination of legislative background and circumstances disclosed much evidence that A-1064 was intended to endorse prayer and return it to the public schools. The legislative hearings and debates were found to be "in terms of public prayer and state involvement in religion." (J.S.A. 90a). Though the New Jersey Legislature makes no recording of its proceedings, Appellees showed that several key legislators—including the bill's chief sponsor (Assemblyman Zangari) and the President of the Senate (Senator Orechio)—made telling

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3 In the past when such measures were passed they were vetoed and never became law. *See, e.g.*, J.A. 394, 397, 399.

remarks disclosing that A-1064's purpose was to encourage children to engage in prayer in school.

The district court properly found that the sole secular purpose proffered in this litigation—creation of a transition period into the school day—was a pretext. The New Jersey Legislature had received no input indicating that existing transition devices were inadequate, or that a regimented minute of silence would be useful. All the input from educators indicated that teachers already had discretion to use silence as a tool when needed.

III. The history and administration of New Jersey's A-1064 also ensured that the statute's primary effect would be to encourage prayer. Despite a widespread public perception that the bill's purpose was to promote prayer, there were no administrative guidelines to explain alternative, secular uses of a minute of silence, and no guidelines to confine teachers in their implementation of the statute. New Jersey made no effort to disclaim an intention of endorsing a religious exercise or to prevent teachers from either intentionally or inadvertently promoting prayer.

IV. Appellees do not contend that a minute of silence exercise cannot be constructed without violating the establishment clause. We contend that New Jersey's statute as enacted and implemented cannot be deemed a valid accommodation measure. First, the Intervenor-Legislature has never argued that A-1064's actual purpose was to enable children to pray. Rather, the legislature has advanced a single purpose—creation of a transition period—which the district court found to be an after-the-fact pretext. Further, the well-grounded findings of the district court indicate that the actual purpose of A-1064 was to return prayer to the schools in a constitutionally impermissible manner.

A state must take extreme care in accommodating religion in the public school environment. *See McCollum v. Board of Educ.*, 333 U.S. 203 (1948). If a state decides to provide a time and place for silent prayer within the classroom, it must at least communicate alternative, non-prayer functions of that period and (through regulations or otherwise) ensure that

teachers will in no way favor the religious function. New Jersey has not taken such care here. Finally, the record showed there was no impediment to prayer (within the existing school framework) which might warrant a state accommodation of religion.

V. The proper standard governing appellate review of a district court's findings of fact is the "clearly erroneous" test of Rule 52(a). Although this Court concluded in *Bose Corp. v. Consumers' Union*, 466 U.S. 485 (1984), that a finding of "actual malice" in a libel case must be subjected to independent appellate review, *Bose* limits this requirement principally to the area of free speech. In addition, *Bose* was grounded largely on an overriding concern to ensure that constitutional rights are not unduly restricted by the lower courts, a principle that makes independent review inappropriate where, as here, the constitutional right at stake was vindicated by the district court.

This Court has consistently treated findings of illicit governmental purpose as questions of pure fact in diverse contexts, including establishment clause cases. *See Hunter v. Underwood*, 471 U.S. 222, 225-29 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). The "clearly erroneous" standard of review is not supplanted merely because the district court's findings of actual legislative purpose may be labeled as ultimate or dispositive "constitutional" facts.

ARGUMENT

I. BECAUSE THE ONLY PARTIES WITH STANDING TO BRING THE CURRENT APPEAL HAVE WITHDRAWN THE APPEAL, THERE IS NO CASE OR CONTROVERSY AND THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION.

Counsel who filed the jurisdictional statement in this matter informed the Court on May 6, 1986, that the current New Jersey Assembly and Senate "do not join in and are not appellants in this matter." (Mot. to Dism. App. 2a). Appellees

submit that the New Jersey Legislature, as Intervenor,[4] was the sole agency which could have processed this appeal. The Legislature's withdrawal therefore leaves this Court without a justiciable case or controversy, dictating dismissal of the appeal for lack of jurisdiction. *See Diamond v. Charles*, 106 S.Ct. 1697 (1986).

Appellants contend that Messrs. Karcher and Orechio originally intervened in this suit as individual legislators, as well as in their capacity as chief executive officers and representatives of their respective houses. (App. Br. at 11, 16). The record, however, refutes that claim.

The hearing on the Legislature's motion to intervene makes unmistakably clear that the party accorded intervenor status was the New Jersey Legislature.[5] Counsel for intervenor began the hearing by announcing his appearance "for the General Assembly and Senate, the intervenors." (Mot. to Dism. App. 12a). He then explained that he was acting on behalf of both the presiding officers of the Assembly and Senate, Mr. Karcher and Mr. Orechio respectively. *Id.* The ensuing discussion made plain that Karcher and Orechio were acting purely in their official capacities as representatives of the Legislature. The following exchange is illustrative:

> Mr. Marinari (counsel for intervenor): As the presiding officers of both houses, they are empowered by the rules of both houses to represent the house in litigation.
>
> The court: They are in a representative capacity?
>
> Mr. Marinari: That is correct.

(Mot. to Dism. App. 15a). Counsel for the intervenors specified further:

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4 The instant suit was first brought against the N.J. Department of Education, as the agency which would implement New Jersey's minute of silence law. The State's Attorney General, as chief law enforcement officer, refused to defend the law. At that point, the New Jersey Legislature, through its presiding officers acting in their official capacities (Messrs. Karcher and Orechio), intervened to defend.

5 The full transcript of that January 18, 1983, hearing is reproduced in the Appendix attached to Appellees' Motion to Dismiss at 11a-27a.

> The institution is coming in as an institution. * * * It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits * * *.

(*Id.* at 16a-17a).[6]

The district court's order permitting intervention provides for intervention of Karcher and Orechio only in a *representative* capacity. (J.A. 54). Subsequently, on appeal to the Third Circuit, and on filing of the appeal before this Court, the only reference to Messrs. Karcher and Orechio was in their representative capacity. (J.S.A. 1a, 106a).

On January 14, 1986, when the 202d legislature assembled, Messrs. Karcher and Orechio were succeeded by Chuck Hardwick and John Russo as Speaker of the General Assembly and President of the Senate, respectively. Messrs. Hardwick and Russo, as successors in office to parties named in their official capacities as litigants, are automatically substituted as the representatives of the intervening party in this litigation. Supreme Court Rule 40(3); Stern, Gressman, & Shapiro, *Supreme Court Practice*, § 18.6, at 724 (6th ed. 1986); *Kentucky v. Graham*, 473 U.S. at 166 n.11. *See also Davis v. Preston*, 280 U.S. 406, 407 (1930) (official capacity party loses authority to pursue an appeal once successor takes office). By letter dated April 21, 1986, Speaker Hardwick, on behalf of the General Assembly, directed that the instant appeal be with-

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6 The intervention by the state legislature through its presiding officers was entirely consistent with "officer-capacity suits" as a pleading device to bring into a litigation "the entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *see Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1332 (1986). Appellants now argue that the presiding officers of the legislature may not have been authorized to intervene on behalf of their respective houses. (App. Br. at 16). This suggestion conflicts not only with representations made by their counsel at the hearing on intervention (Mot. to Dism. App. 15a, 17a), but also with the apparent custom of the New Jersey legislature to allow its presiding officers to intervene in litigation on behalf of the legislative bodies. *See Daggert v. Kimmelman*, 617 F. Supp. 1269 (D.N.J. 1985).

Because the Legislature had standing to defend A-1064, there is no merit to Appellants' suggestion that if there is currently no case or controversy the lower court decisions must be vacated. *See Diamond v. Charles*, *supra*.

drawn. (Mot. to Dism. App. 4a). A similar step was taken by President Russo on behalf of the Senate on April 28, 1986. *Id.* By a joint statement issued April 28, 1986, Messrs. Hardwick and Russo explained that "careful consideration of financial, constitutional and practical" factors had prompted the decision to withdraw the appeal. (*Id.* at 10a).

Once the only authorized intervenors—the New Jersey Senate and Assembly—withdrew their appeal, there was no longer a case or controversy before this Court. *See Diamond*, 106 S.Ct. at 1703-04. While Alan Karcher remains a member of the current New Jersey Legislature (without leadership status), he cannot now assert standing in that member capacity. As noted above, Karcher took part in this litigation solely in his representative capacity. This Court has determined that a party who has litigated in one status (such as in an official capacity of assembly speaker) cannot alter that status at an advanced appellate level in order to preserve an appeal which the real party in interest (the N.J. Legislature) has determined to drop. Thus, in *Bender*, *supra*, a school board member who had been sued in his official capacity could not launch an appeal in his personal capacity either as an individual board member or parent. The Court explained:

> The fact that [the board member] was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages.

106 S.Ct. at 1332 n.6.

Appellants seek to distinguish *Bender* on the basis that the board member there "had no interest in the suit as an individual," while here "the interests of Messrs. Karcher and Orechio" as individual legislators still exist. (App. Br. at 20). This simply misreads *Bender*. The Court in *Bender* did not rule that the individual board member had no cognizable interest. There, the Court held that the board member could not appeal in his individual capacity (for example, as a parent) because he had participated in the litigation solely in his official capacity. 106 S.Ct. at 1332, 1335. This reasoning applies fully to Kar-

cher, who entered this litigation solely in an official capacity and who is likewise seeking to alter his status or capacity before this Court.

There are additional reasons why Karcher cannot pursue this appeal as an individual legislator. Where, as here, a collective body (a legislature) is the party in interest in lower court proceedings, only an agent of the collective body and not an individual member of the body can invoke a right to appeal. *Bender*, 106 S.Ct. at 1333; *see Smuck v. Hobson*, 408 F.2d 175, 177-78 (D.C. Cir. 1969). In *Bender*, this Court ruled that the real party in interest was the legislative entity (a nine-member school board) and that an individual member could not supplant the entity for purposes of processing an appeal. 106 S.Ct. at 1328-29, 1333. "[M]embers of collegial bodies do not have standing to perfect an appeal the body itself had declined to take." *Id.* at 1333. This principle is particularly apt where, as here, a state legislative enactment is in issue. As this Court has explained:

> [T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of "direct" stake [necessary] . . . in defending the standards embodied in that code.

Diamond, 106 S.Ct. at 1705. By barring standing to an individual member of a collegial body, the judiciary avoids becoming enmeshed in examination of whether a particular member is faithfully and adequately advancing the views of the collective body. *See* Dessem, *Congressional Standing to Sue*, 62 N.D. L. Rev. 1, 15 (1986).

Even if Karcher had entered the instant litigation in his individual capacity as a legislator, there would be a final bar to his prosecuting this appeal. In order to pursue an appeal, the prospective appellant must meet Article III standing requirements. *Diamond*, 106 S.Ct. at 1703. Yet an individual legislator ordinarily has no standing in federal court to litigate the constitutionality of a measure adopted by the collective body. *Korioth v. Briscoe*, 523 F.2d 1271, 1277-78 (5th Cir. 1975). This

is so whether the individual legislator is convinced that the statute is unconstitutional and seeks to attack it, or whether the legislator seeks to defend the measure against constitutional attack. *See Poovey v. Edminsten*, 526 F. Supp. 759, 765 (E.D.N.C. 1981); *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *rev'd on other grounds*, 448 U.S. 297 (1980). A legislator's interest in the constitutional status of a statute is a generalized concern shared by all citizens equally; individual legislators therefore lack a personal stake in the outcome necessary to confer standing. *See AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982).[7]

There is a line of lower court decisions in which individual legislators have been accorded standing in order to prevent "nullification" of their votes. *See Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot*, 107 S.Ct. 738 (1987); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). But nullification in this context has meant disenfranchisement—that is, deviation from legally required processes of lawmaking in a fashion which deprives a legislator of an opportunity to vote. *See, e.g., Moore v. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984). Mr. Karcher incurred no such deprivation.

The suggestion that Mr. Karcher retains standing to appeal as a representative of the 200th Legislature, which terminated at the end of 1983, is totally divorced from reality. The New Jersey *Legislature* was admitted as a party in order to defend the minute of silence law. At no time in the protracted course of this litigation was there any suggestion that a prior legislature rather than the current legislature was acting as intervenor. This was true, for example, during the appeal in the Third Circuit, which was conducted in 1984 and 1985 during the term of the 201st Legislature. The 201st Legislature, and not the 200th Legislature, pursued and paid the costs of that appeal. Nor did the notice of appeal or the jurisdictional statement

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7. Individual legislators incur no greater stake when a court declares a statute unconstitutional on grounds of illicit legislative purpose. A judgment about collective legislative purpose does not impugn the character of any individual legislator. Hence, the Appellants' claim of a special injury in the instant case (App. Br. at 26) must fail.

filed in this Court indicate that a prior, expired legislature was involved. (J.S.A. 106a).

It is self-evident that a decision whether to appeal a judgment declaring a state enactment unconstitutional is a matter of policy for the current legislature or executive. Official acquiescence in a declaration of unconstitutionality means that a legislative measure will not be *currently* and prospectively enforced. *Diamond*, 106 S.Ct. at 1705. The primary impact of a decision whether to appeal is on the constituency of the current legislature. This is true as to the many considerations that go into a decision whether to appeal a judgment—importance of maintaining a statute in force, economic costs to be incurred in the appeal, changes in the will of the electorate, and alternative means to accomplish whatever legitimate legislative objectives are at stake.

A prior legislature cannot be accorded a proprietary interest in a State's enactment. The notion that a long-expired legislative body retains control of current litigation offends all sense of sound procedure. Sometimes, many years elapse between passage of a law and its judicial resolution. *See Hunter v. Underwood*, 471 U.S. 222 (1985) (84 years); *Poe v. Ullman*, 367 U.S. 497 (1961) (82 years). Yet dead-hand control would preclude the current legislative leadership from settling a litigation according to a fair assessment of current public policy concerns. Moreover, the dead-hand leadership could no longer consult with its legislative constituency. The current legislative leadership, by contrast, can always consult with its legislative constituency. The current legislature, not the 200th legislature which expired over three years ago, is the appropriate body to decide whether to appeal. Its duly elected representatives have withdrawn the current appeal. That decision of April 1986 ended the case or controversy upon which this Court's jurisdiction hinges.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE PURPOSE OF THE NEW JERSEY LEGISLATURE IN ADOPTING BILL A-1064 WAS AN IMPERMISSIBLE RELIGIOUS PURPOSE—TO PROMOTE PRAYER IN THE PUBLIC SCHOOLS.

A. The District Court Correctly Examined Whether The New Jersey Legislature Acted With An Illicit Purpose—To Promote And Encourage Prayer—When It Adopted A-1064.

Appellants argue that A-1064 was a "facially neutral" statute with a plausible secular purpose on its face. They contend therefore that the district court should never have examined the background and circumstances of the law in order to determine that the measure had no secular purpose and that its object was "religious." (J.S.A. 90a). The argument is misplaced for two reasons. Bill A-1064 was not really neutral on its face. And even if it had been neutral, that fact would not preclude an inquiry into whether the *actual* legislative purpose was to promote and encourage prayer in the public schools.

As to neutrality, although A-1064 uses the language "contemplation or introspection" and does not by terms mention prayer, it cannot be viewed realistically as divorced from prayer. The term "contemplation" often connotes a religious act involving private religious devotion. (J.A. 139-40; R. 295). Most pupils have been exposed to organized silent meditation only in a place of worship. *See* Note, 96 Harv. L. Rev. 1874, 1891 (1983). The opening minutes of the school day in New Jersey were historically used for prayer. (J.A. 355; J.S.A. 67a, 86a). Organized group silence is a traditional form of prayer associated with major religious bodies in New Jersey, such as the Quakers. (J.A. 139, 141; R. 289). Given these facts, the installation of a period for silent "contemplation" at the beginning of the school day is at the very least suggestive of prayer.

Additional factors undermined A-1064's veneer of "neutrality." The statute appears to make the minute of silence permissive,[8] suggesting that persons having conscientious objections should be free to abstain. This acknowledgement of potential conscientious objection to the minute of silence exercise itself betrays a recognition of the exercise's religious character. If the purpose of a minute of silence were simply to promote a secular object like tranquil thought, there would be no need to excuse persons from the silence exercise. *See Abington School Dist. v. Schempp*, 374 U.S. 203, 224 (1963); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). Finally, the only secular purpose asserted by the Legislature in defending its minute of silence law—creation of a transition period with a psychological "calming effect" on pupils—did not appear on the face of the statute. Rather, that purpose was first advanced well into the course of the litigation. *See* J.S.A. 91a (district court finding that A-1064 upon passage became "a statute in search of a secular purpose").

In short, the language of A-1064 was at best ambiguous about actual legislative purpose. Since an organized morning silence exercise carries strong implications of prayer, the district court was warranted in examining whether A-1064's actual purpose was to encourage prayer in New Jersey's public schools.

Even if A-1064 were deemed neutral in its language, that fact would not preclude examination of whether the measure was actually intended to advance prayer. In some areas of constitutional jurisprudence illicit legislative purpose is a key element. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (racial discrimination); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (estab-

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8 The statute uses terms such as "permit" a minute of silence and "discretion" of the individual student. The trial court was uncertain whether A-1064 required students to remain in the classroom during the minute of silence. (J.S.A. 84a). However, all three judges in the Third Circuit concluded that A-1064 was "permissive," and that students objecting to observance of a minute of silence might well be permitted to leave the classroom. (J.S.A. 15a, 22a, 33a). Appellees agree that A-1064 appears permissive on its face and leaves room for an interpretation under which objecting students may leave the classroom.

lishment clause). With regard to the establishment clause, Justice Stevens recently noted:

> In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion. * * *
>
> The proper inquiry under the purpose prong of *Lemon v. Kurtzman* . . . is whether the government intends to convey a message of endorsement or disapproval of religion.

Jaffree, 472 U.S. at 58, 60 n.52 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring)).

Where, as here, illicit purpose is properly in issue, even the facial neutrality of an enactment cannot bar judicial inquiry into the background and circumstances of the enactment's adoption. This was vividly demonstrated in *Hunter v. Underwood*, 471 U.S. 222 (1985). There, litigants challenged a provision of the 1901 Alabama constitution that disenfranchised all persons convicted of a crime involving moral turpitude. Though the measure applied to both blacks and whites, and though there was a plausible legislative purpose visible on the measure's face (the barring of morally unfit voters), the challengers proved that racial animus was actually behind the ostensibly neutral provision. *Id.* at 229. *See also Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large voting district).

The same principle applies under the establishment clause. Facial neutrality of a statute cannot bar inquiry into illicit religious purpose. As Justice O'Connor observed in *Jaffree*:

> [T]he face of the statute *or its legislative history* may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead *requires courts to examine the history, language, and administration of a particular stat-*

ute to determine whether it operates as an endorsement of religion.

472 U.S. at 73-74 (emphasis added). In sum, the district court in the instant case was acting consistently with precedent in examining A-1064's history and background.

A "neutral" statute with an *avowed* secular purpose cannot foreclose judicial inquiry into *actual* legislative purpose. Litigants must be permitted to demonstrate a "sham" secular purpose underlying an enactment. *See id.* at 64 (Powell, J., concurring); *id.* at 75 (O'Connor, J., concurring). Government may not use a pretext or facade in order to promote or endorse a religious exercise. And the only limit to the manufacture of secular purposes is the imaginativeness of counsel representing legislative bodies. These principles are confirmed in cases like *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

B. The Legislative History And Background Of A-1064 Demonstrate That A-1064's Preeminent Purpose Was To Promote Prayer In The New Jersey Public Schools

1. The District Court Considered Relevant, Probative Evidence

In considering an illicit legislative purpose, a court must examine legislative history and background, including contemporaneous statements by members of the relevant legislative body. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *Jaffree*, 472 U.S. at 55-58; *Hunter v. Underwood*, 471 U.S. at 228. Legislators' statements are unlikely to be an exclusive index of legislative purpose. After all, most legislators will either not participate in debates or will avoid any comments which might betray an illicit purpose. Nonetheless, legislators' remarks can furnish a useful element of proof of legislative purpose, especially when made by key participants in the legislative process (e.g., sponsors, floor leaders). *See Jaffree, supra*; *Federal Energy Administration v. Algonquin Inc.*, 426 U.S. 548, 564 (1975); *Grosjean v.*

American Press Co., 297 U.S. 233 (1936). At the very least, committee hearings and legislative debates are indicative of the historical milieu, the information, and the thinking behind a legislative decision, and are thus probative of legislative purpose. *See* Raveson, *Unmasking the Motives of Government Decisionmakers*, 63 No. Car. L. Rev. 879, 977-78, 982-83 (1985).

In the case of A-1064, several factors complicated the task of establishing legislative purpose. The New Jersey Legislature preserves no transcript of its committee hearings or floor debates. (J.S.A. 14a). Plaintiffs' requests for documents used in consideration of A-1064, as well as for admissions regarding legislators' statements, were met by a claim of legislative privilege. (J.A. 3d Cir. 126a-140a). While the claim of privilege was rejected, the trial court did rule that it would be "unseemly" to require legislators to be deposed or to answer interrogatories. (*Id.* at 150a-52a). Consequently, the discovery available to the Appellees here was quite circumscribed.[9]

Despite these barriers, Appellees presented several witnesses who described their first-hand observations of the committee hearings and some of the floor debates leading to passage of A-1064. The district court ultimately concluded that the debate surrounding A-1064 was "in terms of public prayer and State involvement in religion." (J.S.A. 90a). The court similarly found that legislators' statements were "confirmatory of an institutional purpose to accomplish something the Constitution forbids." (J.S.A. 92a). In making these findings the trial judge relied primarily on the witnesses mentioned above, rather than upon newspaper reports quoting legislators' statements which were also in evidence. (J.S.A. 85a n.4).[10]

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9 The district court prohibited Appellees from calling the legislators to testify and granted the motion quashing interrogatories and requests for admissions concerning legislators' statements. J.S.A. 68a n.2; J.A. 3d Cir. at 152a-54a.

10 The Circuit Court found that the newspaper reports presented a "difficult" issue of evidence, but ruled that the district court's conclusions

Nonetheless, the newspaper clippings were properly admitted by the district court and deserve full consideration.[11] Because the newspaper articles were properly admitted, Appellees will use several quotations from the articles to show that the trial court's conclusions concerning the legislative history of A-1064 were well grounded in the record.

2. Legislative Process Demonstrating Illicit Purpose

After A-1064 was filed on March 8, 1982, the first committee hearing took place before the Assembly Education Committee on May 17, 1982. The New Jersey School Boards Association (hereinafter NJSBA) appeared in order to oppose the bill as an unnecessary legislative interference. (J.A. 274, 406-07). Assemblyman Zangari, the bill's chief sponsor, was the sole witness to favor the bill. In his remarks, Mr. Zangari noted that it was "important that our society get back to religious values. . . ." (J.A. 275, 406-07). No one, let alone a trained educator or psychologist, testified as to the possible utility of a minute of silence as a transition period. (*Id.*; *see also* J.A. 300).

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would not have been any different if the newspaper clippings had been excluded from evidence, and that "ample other evidence support[ed] the district court's conclusion that the purpose of the legislation was not secular but religious." (J.S.A. 27a-28a n.9).

11 With regard to legislative purpose, the newspaper articles fall squarely within Fed.R. Evid. 803(24) as more probative to establish the legislative purpose expressed by legislators than any other evidence Appellees could procure through reasonable efforts, and as having circumstantial guarantees of trustworthiness. The district court so ruled. (J.A. 122-26). That court's ruling on the admissibility of this evidence should not be disturbed absent a clear showing of abuse of discretion. *See Lavender v. Kern*, 327 U.S. 645, 654 (1946).

Appellees would have called reporters, if necessary, to testify to the accuracy of the quotations (J.A. 92, 96-97), but the court ruled that this was unnecessary. (J.A. 124). The articles were trustworthy. There was substantial agreement among them as to the legislators' statements, thus corroborating accuracy of the quotations. (J.A. 122). Not a single author of any statement in question ever denied or sought to modify the reported remarks. (See J.A. 96, 98, 122-23).

The next legislative step was a hearing before the Senate Education Committee on June 21, 1982. Again, there was no testimony from any expert or person with background in education to indicate any non-prayer utility of a minute of silence exercise. (J.A. 268). Assemblyman Zangari appeared on behalf of his bill, mentioned that it would have "an educational purpose" (J.A. 269), but also underlined his own positive experience with prayer in the classroom (J.A. 270). When Mr. Joseph Chuman (Plaintiffs' witness) privately asked Mr. Zangari why he was not sensitive to the interests of atheists in propounding his bill, Mr. Zangari replied that their feelings could be discounted because they were so few in number. (J.A. 270).

The second and final Senate Education Committee hearing occurred on September 23, 1982. The NJSBA again appeared to oppose A-1064. Assemblyman Zangari appeared on the bill's behalf. Mr. Zangari was asked why, since students already have opportunities to pray during a school day, A-1064 was necessary. His reply: "They won't publicly do it [pray] unless they're directed." (J.A. 408-09).

Bill A-1064 passed the New Jersey Senate on October 18, 1982, after a one-hour debate. See N.Y. Times, Oct. 19, 1982, at A1. At the debate, advocates of the bill contended that it provided a way to enable schoolchildren to pray quietly and voluntarily; opponents called the bill unnecessary and unconstitutional. *Id.* Senate President Orechio "led the fight for passage." Asbury Park Press, Oct. 19, 1982, Plaintiffs' Exh. 9. Senator Orechio acknowledged that the bill was designed to "bring prayers back into the school through the front door." *Id.* He also commented: "This bill will not harm any school-age child. Rather, it will restore his faith in his Creator." Newark Star Ledger, Oct. 19, 1982, Plaintiffs' Exh. 14. Senator Dumont remarked during the debate that there was no difference between a moment of contemplation in the schools and prayers used at the start of each legislative session. Trenton Times, Oct. 19, 1982, Exh. 12. Senator Bassano, an opponent of the bill, commented:

> I keep hearing the word [prayer] over and over again. And if that's what it's about, then it's unconstitutional. It makes no difference whether you come in the front door or the back door.

Asbury Park Press, Oct. 19, 1982, Plaintiffs' Exh. 9.

On December 6, 1982, Governor Thomas Kean vetoed A-1064. (J.A. 381). The Governor noted that legislators' public statements had revealed "a constitutionally impermissible motive" behind A-1064, making it "unlikely that the bill could pass constitutional muster." (J.A. 382-83). Governor Kean particularly noted the quote that adoption of A-1064 would mean "bringing prayer back into the schools through the front door." *Id.* As chief executive, the governor's assessment of a bill's purpose is entitled to significant weight. *See Schweiker v. Wilson*, 450 U.S. 221, 244 n.7 (1981) (Powell, J., dissenting).

The subsequent override debates in both the Assembly and Senate focused on the issue of prayer in the schools. Any purported psychological benefit from a calming transition period was apparently not discussed. The only educational benefit mentioned was an improvement in school climate and a consequent decrease in crime and disruption. (J.A. 36-37, 369-72; J.S.A. 71a).

The Senate override debate took place on December 16, 1982. According to an eyewitness, there was no discussion of the pedagogical objectives of A-1064, other than the "social control argument" mentioned above. (J.A. 371).[12] Senator Dumont expressed indifference to the apparent mixing of church and state. (J.A. 370). He stated: "I don't think we ought to adhere so closely to the separation of church and state that we forget other things are more important." Bergen Record, Dec. 17, 1982, Plaintiffs' Exh. 10. Senator Kennedy stated that the founding fathers never thought children could not take a moment to think about God and religion, and that perhaps it was time to put the constitutionality of prayer back

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12 One Senator (Paolella) was quoted as saying A-1064 could support "discipline and morality" and not necessarily prayer. (J.A. 372).

before the Supreme Court. Trenton Times, Dec. 17, 1982, Plaintiffs' Exh. 13. At the Assembly override debate on December 13, 1982, Assemblyman Wolf, one of the bill's supporters, stated: "Whether we want to hide behind contemplation or reflection, it's prayer." Newark Star Ledger, Dec. 14, 1982, Exh. 2. *See also* Bergen Record, Dec. 14, 1982, Exh. 4.

Bill A-1064 became law on December 16, 1982. On December 17, 1982, New Jersey's Attorney General, Mr. Kimmelman, announced that as chief law enforcement officer of the state he would take no steps to defend the newly enacted minute of silence law. He had determined, after "careful scrutiny" of the law, that the minute of silence law was unconstitutional. (Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 2-4). Thus, the governor and the attorney general of New Jersey each reached the conclusion that A-1064 was tainted by an illicit purpose to promote prayer in the schools.

3. History of Prior Legislation Provides Additional Evidence

Another useful element of proof concerning the history and background of A-1064 was Plaintiffs' documentation of a succession of similar New Jersey legislative measures concerning morning moments of meditation or silence in the schools. There were 18 such bills introduced between 1968 and 1982. *See* Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Unconstitutional?* 35 Rutgers L. Rev. 341, 356 (1983). These bills, together with material about their legislative history, were introduced in order to show that A-1064 was a culmination of repeated efforts (by forces favoring prayer-in-the-schools) to adopt laws circumventing the Supreme Court's rulings of the early 1960's. After examining the bills, information about their legislative history, and the relevant executive veto messages, the trial court found:

> In New Jersey legislation was proposed from time to time with the rather obvious purpose of reintroducing opening prayer in some form in the public schools. (J.S.A. 67a).

> [M]any New Jersey legislators introduced one bill after another in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling. (J.S.A. 86a).

The district court also determined that A-1064 was part of this succession of events and was infected by the same illicit purpose. *Id.*

Appellants strenuously object to the introduction and use by the trial court of prior legislative measures. (*See* App. Br. at 35, 42).[13] Yet the data about bills of prior legislatures furnished a useful probative link in the evidentiary chain relating to the actual purpose of A-1064. It was helpful to place A-1064 in the context of an historic movement to reintroduce prayer into the schools, just as it is useful to place any legislative enactment in its historical context. *See Hunter v. Underwood*, 471 U.S. at 230-31 (testimony that a 1901 Alabama convention was part of a post-Reconstruction movement in the South to disenfranchise blacks was key to attributing an illicit purpose to facially neutral legislation growing out of that convention).

As the trial court noted, minute of silence laws have both a national and a local historical context which helps cast light on their purpose. (J.S.A. 67a). In the case of the New Jersey Legislature, the record demonstrated that three successive governors had vetoed morning exercise measures (including A-1064) because of constitutional concerns stemming from the perceived religious purpose, and because of grave doubts about any educational need for such exercises. (J.A. 381, 394, 397, 399; *Veto Messages of the Governor* 521-23 (1969)). The New Jersey Department of Education had also gone on record as opposing such prior measures as "contrary to the spirit and holdings of the U.S. Supreme Court." (Position Statement of the N.J. Dept. of Educ. regarding A-648 (1976), dated 2/2/76,

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13 While Appellants do not appear to contest that the prior measures constituted "attempts by earlier independent New Jersey legislatures to return prayer to the public schools," (App. Br. at 42) they argue that the illicit motivation of the prior bodies cannot be attributed to the legislature which adopted A-1064. (*Id.* at 35 n.28).

in Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 9).[14]

C. The Record Below Demonstrated That The Sole Secular Purpose Advanced By The Legislature—A Transition Period—Was A Pretext

Appellants have indicated during the course of this litigation that the sole legislative purpose behind A-1064 was to provide a transition period to calm students before the school day. (J.S.A. 82a; App. Br. at 13). As described above, the legislative history of A-1064 shows no significant attention to this purported rationale; rather, the legislative debates focused sharply on the desired relationship between prayer and the public schools. The record below contains much additional support for the trial court's conclusion (J.S.A. 87a) that the Legislature's asserted rationale was a pretext.

There was not one iota of evidence that anyone connected with New Jersey's educational system had ever communicated to any legislator the notion that a calming transition period was needed within New Jersey's schools. To the contrary, the record establishes that a wide variety of sources had uniformly informed the Legislature that such a device was unnecessary. For example, the New Jersey Education Association (NJEA), the union representing 84,000 teachers in New Jersey, informed the Legislature that it opposed A-1064 because it was unnecessary and appeared to be aimed at subverting constitutional strictures on prayer in the classroom. (J.A. 375-77). Likewise, the NJSBA, representing 611 school boards in New Jersey,

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14 The link between A-1064 (1982) and its predecessors was particularly close with regard to Bill A-2197 (1981). Both bills called for a one minute period of silence in the public schools. Twelve of the twenty sponsors of Bill A-2197 (1981) became sponsors of A-1064 (1982). Assemblyman Zangari was the chief proponent of both measures. Like its successor A-1064, Bill A-2197 was passed after brief debate in which prayer was the focus of discussion. Like A-1064, Bill A-2197 drew opposition from education groups because it was perceived as an effort to reintroduce prayer into the schools. (J.A. 287-89; Plaintiffs' Exh. 78; J.A. 3d Cir. at 655a). Like A-1064, Bill A-2197 provoked an executive veto. (J.A. 399). In short, the links between A-1064 and predecessor morning exercise bills were sufficient to support the trial court's use of such bills to help discern the religious purpose behind A-1064.

opposed minute of silence legislation as simply an effort to reintroduce prayer into the schools. (J.A. 282, 292-94, 403-04; J.S.A. 71a). *See also* R. 320-22 (opposition of the New Jersey School Administrators' Association).

Governor Kean, himself a trained educator, restated in his veto message the same message previously communicated by these groups of informed educators:

> New Jersey public school teachers do not need a legislative mandate of one minute of silence in order to maintain order in their classrooms. Rather, teachers already have the discretion to silence their classes for one minute, five minutes, or twenty minutes, as they in their wisdom choose.

(J.A. 383).[15]

The evidence below went well beyond showing educators' uniform opposition to a transition period. In addition, Appellees presented expert testimony demonstrating three elements: absence of utility in a minute of silence as a transition period; availability of alternative transition devices which could easily be used (and were in fact in use); and harm which would flow from the minute of silence period as structured.[16] This expert

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15 Previous governors had communicated the same message to the Legislature—that teachers could already employ silent contemplation if educationally helpful and that a regimented minute of silence at the start of every day would not be educationally sound. (J.A. 394-97).

16 The main witness was Professor Peter Kuriloff, an expert in social psychology of the classroom and in school discipline. (J.A. 181-82). His testimony established that the minute of silence as a transitional device was a "poor" one in contrast to various alternatives, including existing ones. (J.A. 194, 196-98, 221-23). Moreover, Bill A-1064 included no guidelines for administration and hence would pose "a potential disciplinary nightmare" for school officials. (J.A. 188-89, 202-03). Most important, Professor Kuriloff testified that a minute of silence is a long period for children in kindergarten through third grade, and that the duration would be quite "anxiety provoking" for such children. (J.A. 188-89, 193).

Professor Stanley Rosner of Temple University provided added insight with regard to his specialty—handicapped children. Professor Rosner noted that for many retarded, learning disabled, or emotionally disturbed children

testimony was not aimed at attacking the wisdom of A-1064; it is beyond dispute that the wisdom of legislation is not a judicial concern. Rather, the testimony served to establish that the chasm between the minute of silence as structured in A-1064 and sound educational policy for New Jersey's schools was so deep that a legislative body acting in good faith could not possibly have adopted such a sweeping measure.

Appellants attempted to refute the evidence described above concerning the educational vacuity of a minute of silence for New Jersey schools. They presented a psychologist from Las Cruces, New Mexico, to testify about a "study" he did on a minute of silence there. (J.A. 313-14).[17] Appellants also presented a fifth grade teacher from Sayreville, New Jersey, who thought that a moment of silence there had been useful. (J.A. 327-28).[18] Finally, Appellants presented a sociologist who contended that the minute of silence might have some educational utility. (J.A. 352-53). There was, of course, not a shred of evidence that the legislature had been aware of any of this material when it adopted A-1064. "A rationale developed long after passage of [a measure] . . . but asserted in support of its 'purpose' is entitled to little probative value." *Walter v. West Va. Bd. of Educ.*, 610 F. Supp. 1169, 1176 (D.W.Va. 1985).

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a minute of silence would present difficulties of attention and would have negative behavioral impacts. (J.A. 303-07). The testimony of Professors Kuriloff and Rosner was supplemented by New Jersey school administrators and educators who also could find no educational utility behind a minute of silence exercise as imposed by A-1064. (J.A. 230-31, 238, 294). The transition function was already served by existing opening exercises. *See, e.g.*, N.J.S.A. 18A:36-3(c) (flag salute).

17 Despite use of the study in New Mexico litigation, a federal judge there found that the local moment of silence law was not intended to promote "intellectual composure," but rather to advance prayer. *See Duffy v. Las Cruces School District*, 557 F. Supp. 1013 (D. N.Mex. 1983). The "intellectual composure" rationale was found to be an "afterthought" devised to try and salvage a religious exercise. *Id.* at 1016.

18 Of course, Sayreville used an exercise shorter than a minute, and Sayreville had been operating under a local ordinance, and not pursuant to Bill A-1064.

Having heard this various testimony, Judge Debevoise concluded that the "transition period" rationale was an after-the-fact rationale manufactured to try and salvage A-1064. (J.S.A. 84a-88a). There was no genuine educational need—no curricular purpose, either actual or perceived—behind A-1064. The minute of silence was simply "an empty sack" into which the Legislature wanted to pour prayer. (J.A. 189, 220, 230-31).

D. By Invalidating A-1064 Only After Finding That The State's Sole Asserted Secular Purpose Was A Pretext, And After Finding That The Actual Purpose Of A-1064 Was Religious, The District Court Correctly Applied The Purpose Prong Of *Lemon v. Kurtzman*

As this Court recently explained in *Jaffree*, a statute fails the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 62 (1971), if it does not have "a clearly secular purpose." 472 U.S. at 56. The Court added: "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.' " *Id.* (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

This is precisely the standard which the district court applied in the instant case. Appellants incorrectly assert that the district court applied a novel standard requiring "an overwhelmingly obvious and important secular purpose" for a statute to satisfy the purpose prong of *Lemon v. Kurtzman*. (App. Br. at 28). Judge Debevoise was entirely faithful to the *Jaffree* standard in invalidating A-1064 only after finding that the state's sole secular purpose was a pretext, and that the bill's background and history revealed an actual religious purpose of reintroducing prayer to the public schools. (J.S.A. 87a, 91a, 92a, 94a).[19]

In effect, the trial court found that there was *no* secular purpose behind A-1064, because it rejected as a pretext the only secular purpose identified by the Intervenors (as well as finding

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19 As documented in detail in Point IV, *infra*, when the trial court stated that the purpose of A-1064 was "religious," it meant that the Legislature's purpose was to reintroduce prayer to the public schools in an unconstitutional manner.

that the actual purpose was to reintroduce prayer). But it would be sufficient under the purpose prong of *Lemon v. Kurtzman* to find that the predominant or preeminent legislative purpose was to promote religion or prayer. *See Stone v. Graham*, 449 U.S. at 43. For the secular purpose requirement cannot be deemed satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

The preeminent religious purpose standard is appropriate, as opposed to a "no secular purpose" standard, because it is unrealistic to demand that litigants demonstrate the total absence of a secular purpose. Crosses may be erected on public property in part to attract tourism. Posting of the ten commandments may be intended by some legislators to help instill moral (as opposed to religious) values, or to illustrate one of the foundations of our legal system. *See id.* Given the inevitable existence of subsidiary secular purposes underlying a religious measure, it is sufficient under the purpose prong of *Lemon v. Kurtzman* to find that a statute's preeminent or predominant purpose is to promote religion or prayer.

In sum, this Court should uphold the district court's determination to invalidate A-1064 because it is clear from the record that the preeminent purpose of the New Jersey Legislature was to encourage prayer in the schools. Judge Debevoise wisely heeded the admonition of one of his colleagues on the federal bench:

> We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men.

Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 654 (E.D. La. 1961). The governor of New Jersey knew that A-1064 was intended to promote prayer in the public schools. (J.A. 381-83). The attorney general knew that A-1064 was intended to promote prayer. (J.S.A. 66a). School administrators knew. (J.A. 230-31; R. 321). Teachers knew. (J.A. 40; R. 323). The editors of New Jersey's largest newspapers knew. (Plaintiffs' Exh. 27, 29, 30, 35, 36, 37, 40, 41, 42, 44, 45, 47,

49). Judge Debevoise could hardly blind himself to the public statements of A-1064's supporters and the legislative history and background, as described above. He simply agreed with the observation of one superintendent of schools, who stated with regard to A-1064 and prayer:

> Call it what you want, but if it walks like a duck and has feathers and quacks, it is still a duck. (J.A. 234).

III. BILL A-1064 HAD THE DIRECT AND IMMEDIATE EFFECT OF ADVANCING RELIGION AND HENCE VIOLATED THE "EFFECTS PRONG" OF *LEMON V. KURTZMAN*

A legislative measure which has the "direct and immediate effect of advancing religion" constitutes an unconstitutional establishment of religion. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 785 n. 39 (1973). The district court in the instant case ruled that A-1064 would both advance and inhibit religion. (J.S.A. 94a). That court determined that by setting aside a special time period to allow schoolchildren to pray, and by requiring all children present to be quiet and respectful, New Jersey would be advancing religion for those children whose prayer habits were suited to that format while inhibiting religion for those children whose prayer required sound or movement. (J.S.A. 95a-96a). The Third Circuit refused to endorse this ruling of the district court. (J.S.A. 21a-22a).[20]

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20 The Third Circuit's unwillingness to uphold this aspect of the trial court's decision was grounded in part on the circuit court's perception that A-1064 is "permissive" in force. That is, the circuit court felt that the law permits students not to participate in the minute of silence exercise—presumably allowing them to leave the classroom. (J.S.A. 20a-21a). Appellees agree that this is a possible reading of A-1064. Nonetheless, Appellees submit that for reasons articulated in this Point, A-1064 should be deemed to have the direct effect of advancing religion even if children's participation in the minute of silence exercise is fully permissive.

Some courts have invalidated moment of silence laws according to "effects" analysis. *See Duffy v. Las Cruces School District*, 557 F. Supp. 1013, 1021 (D.N.Mex. 1983); *Opinion of the Justices*, 440 N.E.2d 1159, 1162 (Mass. 1982). These courts have reasoned that if a minute of silence is constructed in significant part to facilitate prayer, the appearance of government endorsement of religious activity within the schools impermissibly advances religion. Indeed, the juxtaposition of voluntary religious practice with a government operated school system has frequently been deemed to provide a symbolic benefit to religion inconsistent with the establishment clause. *See, e.g., Engle v. Vitale*, 370 U.S. 421 (1962) (voluntary school prayer); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (released time for instruction within the public school building).

Appellees acknowledge that *Jaffree* contains language suggesting that some Justices of this Court are willing to uphold some moment of silence laws. Consequently, in contending that A-1064 carried the impermissible effect of advancing religion, Appellees do not rely merely on the fact that the state set aside a time within the public school classroom with the purpose (exclusively or predominantly) of facilitating prayer. We point instead to several factors involving the New Jersey statutory scheme which particularly impel the conclusion that A-1064 in application would directly advance religion.

A. Under The Minute Of Silence As Structured Pursuant To A-1064, Some Teachers Would Inevitably Utilize The Minute Of Silence For Prayer And Would Thus Influence Impressionable Children To Engage In Prayer

There was substantial testimony in the record indicating that some teachers would likely use the minute of silence flowing from A-1064 in order to pray, and that this would involve displaying the outward manifestations of prayer customary to their denominations. (J.A. 32-34, 45-46, 130-31, 159, 199, 217). For example, Professor of Educational Psychology Peter Kuriloff predicted that approximately 5% of teachers in a region such as New Jersey would be inclined to utilize a

morning minute of silence for prayer (J.A. 217), and that young children would be affected by teachers' cues. (J.A. 199).[21] In addition, the NJEA supported the view that the personal religious beliefs of some teachers would likely manifest themselves in a fashion (folded hands, bowed heads, and the like) which would influence young impressionable students. *See* Brief of NJEA, *amicus curiae*, in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 15, 18.

With regard to teacher utilization of a minute of silence to engage in prayer, there are significant differences between the situation in New Jersey under A-1064 and the situation in other states. In some jurisdictions, teachers have been issued instructions about how to handle the minute of silence—how to introduce it and how to respond to students' questions about it. *See Gaines v. Anderson*, 421 F. Supp. 337, 340 n.4. (D.Mass. 1976). In New Jersey, by contrast, the Legislature made A-1064 effective immediately upon passage (J.S.A. 111a), and no guidelines or instructions were made available with regard to implementation. On the day after A-1064 became effective, the Commissioner of Education simply informed district school superintendents that the "statute should be permitted to speak for itself." (J.A. 3d Cir. 19a).[22] Local superintendents had sought clarification from the Commis-

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21 Predictions rather than observations were necessitated because A-1064 was not actually implemented in many locales (*see* J.A. 233) between its passage on December 16, 1982 and issuance of a temporary restraining order on January 14, 1983. (J.A. 50).

22 One can surmise why the Commissioner of Education chose not to provide implementing guidelines or instructions. Apparently, the Commissioner shared the perception of the state's governor and attorney general that A-1064 was intended to promote prayer. To be faithful to the perceived statutory purpose, then, the Commissioner would have had to issue guidelines reflecting the prayer purpose of the bill. He chose instead to issue no guidelines.

There are several bases for this surmise. First, the Commissioner did not seek to defend the bill's constitutionality even though he was a named defendant in the suit. Further, a deputy attorney general represented to the district court that "the state defendants believed, as did plaintiffs, that the statute was unconstitutional." (J.A. 3d Cir. 90a).

sioner of Education, but drew no response. (J.A. 233; R. 325). The result was utter confusion.[23]

In the absence of either legislative or administrative guidelines explaining the approach which teachers were to follow in implementing A-1064, it was inevitable that the predictions mentioned above would in fact be fulfilled. That is, it was inevitable that some religiously oriented teachers would utilize the minute of silence to pray and thus would influence the impressionable children in their charge. For an illustration of the tendency of religiously oriented public school teachers to utilize a moment of silence exercise to influence schoolchildren, *see Walter v. West Va. Bd. of Educ.*, 610 F. Supp. 1169, 1171-73 (D.W. Va. 1985). *Cf. Grand Rapids School District v. Ball*, 473 U.S. 373, 384-85 (1985).

The custom of opening the school day with prayer had survived in New Jersey up until the early 1960's—within the memory of many teachers, parents, and administrators. (J.A 355; J.S.A. 67a, 86a). The message implicit in the Legislature's particular selection of a silent period *at the beginning of the school day* did not go unnoticed by New Jersey's educators. *See* Brief of NJEA, *amicus curiae*, in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 13, 18. In short, the placement of the silent minute at the beginning of the school day, along with the total absence of guidelines for implementation of A-1064, meant that A-1064 would directly result in some teachers engaging in prayer and thus influencing their impressionable charges to follow suit.

B. Because The Universal Public Perception Of A-1064 Was That Its Purpose Was To Encourage Prayer, That Law Had The Inevitable Effect Of Advancing Religion

If the public reasonably perceives that state government has endorsed a religious exercise in public school classrooms, the effect of the government action is the advancement of religion.

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23 In some New Jersey localities, the minute of silence law was not implemented at all. (J.A. 233). In some locales, it was implemented as a mandatory exercise. (J.A. 25-26, 39-40). In another locale, students were told to stand up, close their eyes, and lower their heads during the minute of silence. (R.156).

See Jaffree, 472 U.S. at 76; *Duffy*, 557 F. Supp. at 1016; Note, 96 Harv. L. Rev. 1874, 1888 (1983). In the case of A-1064, there was considerable evidence that the bill was widely perceived as a mechanism to reintroduce prayer into the schools. Evidence indicated that this was a common perception among students, parents, teachers, and administrators. (J.A. 28, 39-40, 43, 45, 229, 234; R. 323-24). Several important organizations such as the NJEA (teachers' union), the NJSBA (schoolboards' association), and the NJSAA (school administrators' association) fully shared this perception of A-1064's purpose. (J.A. 377, 282; R. 320-21).

These perceptions were solidly grounded. They flowed from the fact that the legislative history and background of A-1064 were suffused with a legislative preoccupation with prayer in the schools. (*See* Point II, *supra*). That legislative history and focus were brought home to the general public in a variety of ways. First, the governor and the attorney general had each branded A-1064 as an illicitly motivated measure.[24] Second, the press reports concerning the legislative debates over A-1064 confirmed this message—that A-1064 was intended to return prayer to the public schools. Third, editorials in eight of the state's largest newspapers unanimously proclaimed that A-1064 was a transparent effort by the legislature to return prayer to the public schools. (Plaintiffs' Exh. 27, 29, 30, 35-37, 40-42, 44-45, 47, 49).

Despite the Legislature's clear awareness of the widespread perception of A-1064 as a prayer measure,[25] it did nothing to

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24 A deputy attorney general later commented on the degree of publicity that the attorney general's decision not to defend A-1064 had received. She mentioned that the announcement had been carried in virtually every state newspaper as well as on radio and T.V. broadcasts originating in New York and Philadelphia. (J.A. 3d Cir. 84a). She observed: "Just about everyone in the state was aware of the executive branch's position regarding the constitutionality of this statute [A-1064]." (*Id.*).

25 The New Jersey Baptist organization had sent mailgrams to every legislator urging them not to override the governor's veto because Bill A-1064 was regarded as unconsitutional. (R. 296-97). The New Jersey Council of Churches (representing 3500 churches) had likewise communicated with the

dispel the notion that A-1064 was intended to return prayer to the public schools. This silence stands in sharp contrast to other states in which legislators have included explicit statutory language disclaiming that their moment of silence laws are intended to endorse prayer. *See* Note, 58 N.Y.U. L. Rev. 364, 396 (1983) (listing six states whose moment of silence laws contain a disclaimer of any intention to promote religious exercises).

In the face of a public perception that A-1064 was aimed at reintroducing prayer in the schools, the Legislature neither disavowed this object nor provided implementation guidelines which might have dispelled any notion of a state imprimatur upon prayer. Because of the clearcut and reasonably based public perception of A-1064's purpose, the bill must be deemed to carry the impermissible effect of advancing religion.

There were also locales in which the minute of silence was administered as a mandatory exercise. (J.A. 25-26, 39). In such places, the influence of the state-organized exercise would be patent. There, impressionable schoolchildren would be affected by some peers' praying and using the traditional indicia of prayer such as folded hands and bowed heads. That each child would be free to decide whether to pray does not obviate the indirect pressure upon non-religious minorities to conform. "The law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Jaffree*, 472 U.S. at 60 n.51 (quoting *McCollum*, 333 U.S. at 227). Inevitably, some children would pray because of the perceived message from the existence of the silence exercise. Other children would be subject to the peer pressure that accompanies even voluntary prayer.

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legislators, urging them not to override the veto because A-1064 was seen as "an attempt to circumvent" Supreme Court decisions. (R. 302-03). The NJEA (teachers' union) had used its five lobbyists to convey to the Legislature the union's position that A-1064 constituted "a backdoor approach to bringing prayer into the schools." (J.A. 376-77).

IV. ON THIS RECORD AND AS A MATTER OF ESTABLISHMENT CLAUSE JURISPRUDENCE, A-1064 CANNOT BE SUPPORTED BY A LEGISLATIVE PURPOSE TO ACCOMMODATE RELIGION

Some *amici* have suggested to this Court that A-1064 might be sustainable on the basis that its purpose was to accommodate religious practice by providing students with an opportunity to pray. *See, e.g.*, Brief for the United States, at 15-21; Brief for the Catholic League for Religious and Civil Rights, at 9-10. This suggestion is untenable for a number of reasons.

First, Appellants never asserted such a claim and would be barred from doing so at this juncture. The Legislature which intervened to defend A-1064 never argued that the actual legislative purpose was to provide an opportunity for some students to pray. To the contrary, during trial the Legislature advanced a single justification for its minute of silence law—provision of a calming transition from the bustle of the playground. (J.S.A. 82a). Appellants continue to defend A-1064 on the ground that it provides a transition period into the school day. (App. Br. at 13). *See also* Juris. Statement at 21 n.10 (arguing that the Third Circuit was wrong in attributing an accommodation purpose to A-1064).

Appellees focused considerable efforts at trial on repudiating the sole proffered legislative purpose—a transition period. They succeeded to the satisfaction of both the district and circuit courts in showing that the sole justification advanced for the statute was a pretext. (J.S.A. 87a; 27a). The injection of an "accommodation" defense at this stage would relegate the efforts of the trial court to an exercise in futility. That court's whole perspective of this case was shaped by good faith reliance on the Legislature's representations and proofs as to purpose. *Amici curiae* cannot at this point be permitted to alter the whole defense. *See Witters v. Washington Dep't for the Blind*, 106 S.Ct. 748, 751 n.3 (1986).

Second, an accommodation purpose is a legitimate basis for an enactment only where government is either eliminating an obstacle to free exercise, or is seeking to afford even-handed treatment to religion while administering government benefits.

See, e.g., Hobbie v. Unemployment Appeals Comm'n, 107 S.Ct. 1046, 1051 (1987) (state may treat Sabbatarians in common with Sunday observers for purposes of an unemployment compensation program); *Witters*, 106 S.Ct. 748. In the absense of some obstacle to free exercise, or in the absence of some spectre of uneven treatment of religion, a governmental effort to accommodate religious practice exceeds establishment clause bounds. If government intervenes just to facilitate a religious practice, the government's power and prestige is arrayed behind the religious practice in a manner conveying a message of support or endorsement. *See Stone v. Graham*, 449 U.S. 39 (1980).

The hazard of such an implicit message is particularly obvious in the setting of impressionable schoolchildren. If a state were to provide chapels within public school buildings, the message reinforcing private religious practice would be enough to trigger the establishment clause. The governmental provision of a special time within the classroom solely or primarily in order that students have a special opportunity to pray, with teachers ensuring that all students maintain the decorum necessary for such prayer, is similarly liable to carry with it a message of endorsement. This message is particularly powerful where a purported secular usage of the time provided is a mere pretext, and no guidelines explain or confine implementation of the silent period.[26]

The record here is devoid of any indication that schoolchildren in New Jersey have so few quiet moments during the school day that there exists a significant obstacle to a moment of prayer. Indeed, the record indicates that opportunities customarily exist within the school day in which students might

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26 This was essentially the thrust of Judge Gibbons' majority decision in the Third Circuit. He treated the legislative purpose behind A-1064 as accommodation. He then invalidated the statute because he agreed that plaintiffs had demonstrated that no other "secular" purpose underlay the statute, and because pure accommodation of prayer in the public schools would violate the Establishment Clause. (J.S.A. 29-30a). Appellees disagree with Judge Gibbons' conclusion that accommodation was the purpose of A-1064. But we agree with his conclusion that if accommodation of prayer was the exclusive or predominant purpose of A-1064, then the measure is unconstitutional.

silently meditate or pray. (J.A 241, 249; J.A. 3d Cir. 643a). Logic also dictates that study halls, recess, or other unstructured moments can be utilized by a student for individual silent prayer. *See* Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 Yale L.J. 1631, 1637 (1986). And, of course, students are completely free to pray before or after the school day. In short, there was no showing of any lack of opportunity for children to pray before, after, and during the school day.

Any state which accommodates prayer in the schools without any indication that there are obstacles to prayer risks conveying a message that the state endorses and encourages prayer. When, as here, the state issues no guidelines conveying a secular object of the period of silence, and issues no disclaimer of an object to encourage prayer (in the face of a wide public perception that the object is to promote prayer), the risk becomes a reality. The state is in fact conveying a message encouraging prayer.

There exists a third reason why A-1064 cannot be salvaged as an accommodation of prayer measure. The district court made findings, well grounded in the record, that the purpose of A-1064 was religious. (J.S.A. 86a-94a). Careful reading of Judge Debevoise's opinion shows that by "religious" he meant that the legislative purpose was to advance religion by returning prayer to the public schools, clearly an illicit purpose going beyond mere accommodation.[27] For example, Judge Debevoise referred to a series of prior meditation and moment of silence bills as "attempts to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling"; he then found that A-1064 "is but the most recent of such bills motivated *by these sentiments*." (J.S.A. 86a-87a (emphasis added)). Judge Debevoise based his conclusion that A-1064's purpose was

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27 "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer . . . ." *Jaffree*, 472 U.S. at 59.

Judge Debevoise determined not only that A-1064 "mandate[d] a period at the start of each school day when all students would have an opportunity to engage in prayer," (J.S.A. 86a), but also that the purpose was to reintroduce prayer to the schools in an unconstitutional manner. *Id.* at 87a, 90a, 92a.

"religious, not secular," in part on evidence such as the Legislature's prior efforts to evade *Abington* by reintroducing "a mandatory time for prayer in the public schools." (J.S.A. 90a). After ruling that the overall circumstances of A-1064's adoption "point inescapably to an essentially religious purpose," Judge Debevoise added:

> The statements of the legislators in committee, in the floor and to the public as disclosed by the evidence in this case are consistent with and confirmatory of an institutional purpose to accomplish something the Constitution forbids.

(J.S.A. 92a). In short, the district court determined that the purpose of A-1064 was not simply to accommodate students wishing to pray, but to promote religion by returning prayer to the public schools in contravention of this Court's dictates.[28] This purpose of encouraging a religious exercise was, as *Jaffree* establishes, constitutionally impermissible. 472 U.S. at 59-60.

Fourth, the New Jersey minute of silence format, while providing an opportunity for some students to pray if they choose, imposes a burden both on persons wishing to use

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28 Judge Gibbons' majority opinion in the Third Circuit commented: "we do not believe a finding that the religious purpose was to encourage prayer over other alternatives rather than to accommodate, would be sustainable." (J.S.A. 29a). This conclusion was apparently grounded on a view that if the minute of silence statute was permissive in nature—*i.e.*, did not require students to participate in the silence exercise—it could not be deemed to be aimed at encouraging or endorsing prayer. (*Id.* at 27a-28a). Appellees submit that this view was erroneous. If the Legislature installed a voluntary and permissive exercise with the purpose of returning prayer to the schools, that would be an illicit legislative purpose even though the means chosen (a voluntary exercise) would be less offensive than installation of a mandatory exercise. *See Engle v. Vitale*, 370 U.S. 421, 431 (1962). *Cf. Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (initiation of an elective course in transcendental meditation violates the establishment clause). Moreover, the Third Circuit upheld the district court finding that A-1064 had no secular purpose. (J.S.A. 27a). This effectively meant that the only non-prayer purpose submitted by the Legislature had been refuted, thus leaving intact the inference that the Legislature was only concerned about prayer. If a legislature sets aside a time for prayer without developing or communicating a secular use for the time period, the inevitable effect is to advance prayer.

sound or movement in their prayer and on persons who have conscientious objections to prayer in the classroom. Testimony at trial demonstrated that there are many religious sects which utilize modest amounts of noise (such as chanting) or body movements in their prayers. (J.A. 143-44, 159). The trial court accordingly found that while A-1064 might offer a chance for some persons to engage in silent prayer, it would preclude "others whose prayers require action and/or sound" from utilizing the same classroom locale for prayer. (J.S.A. 88a, 96a). Though these other persons could probably be "accommodated" in school locations outside the classroom, that could be done only at the cost of leaving the classroom and thus losing some class time.[29] A veteran school administrator testified that accommodating objectors to the minute of silence would take up much more than a minute and would take additional time away from instructional purposes. (J.A. 239-41). What this illustrates is that if prayer is to be accommodated in the public school building, designated places outside the immediate classroom must be utilized. Otherwise, the minute of silence becomes a quasi-sectarian exercise accommodating students of some religious persuasions but inconveniencing persons of other persuasions and conscientious objectors.[30]

V. THE DISTRICT COURT'S FINDINGS THAT A-1064 HAD NO SECULAR PURPOSE AND THAT ITS PREEMINENT PURPOSE WAS TO REINTRODUCE PRAYER IN THE PUBLIC SCHOOLS ARE FACTUAL FINDINGS SUBJECT TO RULE 52(a)'s "CLEARLY ERRONEOUS" STANDARD OF REVIEW

Appellants use *Bose Corp. v. Consumers' Union*, 466 U.S. 485 (1984) to argue that a finding of illicit religious purpose (or

29 Similarly, students with conscientious objections to prayer in the classroom could presumably leave the room to avoid exposure to any religious exercise. Again, this could be accomplished only by losing some time from the class day.

30 The record shows that in addition to the Plaintiffs-Appellees who filed the instant suit, there were other conscientious objectors to A-1064. (J.A. 232, 239-40).

of no secular purpose) represents an "ultimate constitutional fact" (App. Br. at 43), and that "questions of constitutional fact compel an appellate court's *de novo* review of the record." (*Id.* at 46). Even if the Court were to conduct a *de novo* review of the record in this case, the district court findings of illicit purpose should be upheld. However, the proper standard of review of the district court's findings of fact is Fed. R. Civ. P. 52(a)'s "clearly erroneous" rule. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Appellants' effort to expand the limited exception to Rule 52(a) announced in *Bose* is not supported by any pronouncement of this Court.

Bose holds that a finding of "actual malice" in a libel proceeding must be subjected to independent appellate review. While *Bose* cannot be confined to libel cases, the opinion indicates that its teaching is limited to the free speech area. The Court, relying on precedents treating fighting words, incitement to riot, contempt of court, obscenity, and child pornography, concluded that independent appellate review of a record is necessary in First Amendment speech cases in order to ensure "that the judgment does not constitute a forbidden instrusion on the field of free expression." *Bose*, 466 U.S. at 499.[31]

Bose also reflects an overriding interest in ensuring that constitutional rights will not be unduly restricted by the lower courts. *Bose* states that independent appellate review may be necessary in free expression cases "to confine the perimeters of any unprotected category within acceptably narrow limits . . . to ensure that protected expression will not be inhibited," *id.* at 505, and "in order to preserve the precious liberties established

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31 Since *Bose* was decided, this Court has explicitly refused to expand its limited call for independent appellate review to cases involving claims of unconstitutional vote dilution, *see Thornburg v. Gingles*, 106 S.Ct. 2752, 2781 (1986), and discrimination against interstate trade, *see Maine v. Taylor*, 106 S.Ct. 2440, 2451 (1986). The Court in these instances refused to extend *Bose* even though the findings involved dispositive issues of constitutional fact. The only post-*Bose* decision of this Court which does authorize independent appellate review is *Miller v. Fenton*, 106 S.Ct. 445 (1986). *Miller* relied upon fifty years of unbroken Supreme Court precedent holding that voluntariness of a confession is a legal question requiring independent federal determination. *Id.* at 450. *Miller*'s rationale is wholly unrelated to a district court's finding of actual purpose in an Establishment Clause case.

and ordained by the Constitution." *Id.* at 511. Thus, *Bose* reflects the Court's conviction that the appropriate division of responsibility requires judges—"and particularly members of this Court," *id.* at 501—to engage in independent appellate review of lower courts' *denials* of federal constitutional rights. Because the district court here vindicated the right to be free from establishment of religion, independent review is inappropriate.[32]

Even if independent appellate review is not confined purely to free speech issues, or to cases in which a constitutional right was denied in the trial court, its reach cannot be extended to a finding of illicit legislative purpose. As a first principle, it is important to note that labeling an issue as a "constitutional fact" or "an ultimate fact" does not alter the "clearly erroneous" standard of review. *See, e.g., Maine v. Taylor*, 106 S.Ct. at 2451; *Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979). Rather, the issue is one of proper allocation of judicial responsibility. *See Miller v. Fenton*, 106 S.Ct. 445, 451-52 (1985); Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 234-39 (1985).

Actual legislative purpose is a factual question whose resolution hinges on determination of various subsidiary facts. A district court finding on legislative purpose ought therefore to be subject to the "clearly erroneous" test of Rule 52(a).[33] This

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32 No one has argued that the free exercise clause *requires* moments of silence in the schools. Hence, a finding concerning establishment here does not infringe any citizen's free exercise rights.

The *Bose* Court was obviously troubled by the fact that the district court had created a rule of inference to determine actual malice, a rule with which the Court disagreed. In this respect, *Bose* stands in stark contrast to the district court's finding of illicit purpose in the instant matter. That finding was not based on any inferential rule of general applicability, but on a specific conclusion that the asserted secular purpose of the legislation was a pretext and on a record replete with direct evidence that the actual purpose of the law was to return prayer to the public schools.

33 Whether the factual finding is grounded on credibility of witnesses, documentary evidence, or inferences from subsidiary facts, the rationale for the clearly erroneous standard is still applicable. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *see* C. Wright, *Federal Courts*, ¶ 96, at 648-49 (4th ed. 1983). But where, as here, findings also are grounded on

Court has consistently indicated that district court findings concerning illicit purpose of government decision-makers—for example, purposeful racial discrimination—are subject to the "clearly erroneous" scope of review. In *Roberts v. Lodge*, 458 U.S. 613 (1982), the "clearly erroneous" standard was applied to a district court finding that an at-large election system had been maintained by the governmental body for invidious purposes. *Id.* at 622-23. That standard was applied not just to subsidiary questions of fact, but also to the ultimate factual inference of purposeful discrimination. *Id.* at 623-24. *See also Anderson*, *supra* (government discrimination in hiring).[34]

The same considerations dictating application of a "clearly erroneous" standard to factual findings of racially discriminatory purpose dictate application of an identical standard to findings of religious purpose. *See Lynch*, 465 U.S. at 680-81; *id.* at 704 n.11 (Brennan, J., dissenting). Both areas involve the application of a settled constitutional norm to disputed facts—grist for the mill of federal district courts. The substantive issue under review here does not implicate the kind of fluid constitutional norm which dictates independent appellate review.[35] *Jaffree* fixes the relevant norm in administering the "purpose prong" of establishment clause jurisprudence. A legislative measure will be invalidated if shown to lack a genuine secular purpose, or if "government's actual purpose is to endorse or disapprove of religion." *Jaffree*, 472 U.S. at 60-61.

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assessments of the credibility of witnesses, the district court's unique role in determining demeanor and tone of voice demands even greater respect under Rule 52. *Anderson*, 470 U.S. at 574.

34 "Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education v. Brinkman* * * *, the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly erroneous rule." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

35 The evolution and elaboration of a dynamic constitutional norm warrants independent appellate review. *See* Monaghan, *supra*, 85 Colum. L. Rev. at 236, 242, 264-68.

In the instant case Appellants advanced only one legislative purpose before the district court—to impose a transition period between the playground and the rest of the school day. (J.S.A. 82a). After consideration of extensive evidence, including the testimony of numerous witnesses, the district court concluded that this rationale was an after-the-fact pretext and that A-1064 therefore had no secular purpose. (J.S.A. 87a). This finding constitutes a finding of pure fact. It encompasses no legal standards; it is a factual rejection of the Appellants' asserted rationale as a sham.

The district court also made a factual finding that the actual purpose of A-1064 was to advance religion by reintroducing prayer to the public schools. This issue of actual legislative purpose is also a question of pure fact, based in turn on a great number of subsidiary factual findings of the district court. It is in no part a legal question, in no part a judicial balancing of social values. It is a finding of the actual intent of a collective body after an extensive evidentiary hearing by the court which has the greatest expertise and experience in weighing the evidence (and is in the best position to judge the credibility and demeanor of the witnesses who testified). *Cf. Anderson*, 470 U.S. at 574. As such, the district court's finding is indistinguishable from the countless findings of unconstitutional purpose that have been reviewed by this Court under the "clearly erroneous" standard. *See, e.g., Thornburg v. Gingles*, 106 S.Ct. 2752 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982).

CONCLUSION

For the reasons set forth herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

NORMAN L. CANTOR*
RICHARD M. ALTMAN**
ANNE P. MCHUGH
PELLETTIERI, RABSTEIN & ALTMAN

JOHN A. POWELL
DAVID B. GOLDSTEIN
AMERICAN CIVIL LIBERTIES UNION

ERIC NEISSER
ACLU OF NEW JERSEY

Attorneys for Appellees

*On the Brief
**Counsel of Record

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